No. (1)

SUPREME COURT, U.S.
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In The Supreme Court of the United States

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A. RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Trawick H. Stubbs, Jr.
Counsel of Record
Laurie B. Biggs
STUBBS & PERDUE, P.A.
8450 Falls of Neuse Road
Suite 206
Raleigh, North Carolina 27615
(919) 870-6258

Counsel for Petitioners

Kenneth E. Banks
LAW OFFICES OF KENNETH E. BANKS
Post Office Box 25206
Fayetteville, North Carolina 28314
(910) 864-3611

Counsel for Petitioners

THE LEX GROUP DC ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTION PRESENTED

Section 525(a) of the United States Bankruptcy Code prohibits certain discriminatory conduct by governmental units against individuals or entities that have been debtors under Title 11 of the United States Code or that have not paid a debt that was discharged under Title 11. Section 3702(b)(1)(B) of VA Home Loan Guaranty Program, 38 U.S.C. § 3701 *et seq.* allows Respondent to deny full reinstatement of the Home Loan Guaranty to a Veteran if the Respondent has suffered a loss on the guaranteed loan, including cases in which the loss was suffered as a result of the discharge of a debt under Title 11. The Question Presented is:

Whether the anti-discrimination provisions contained in 11 U.S.C. § 525(a) are applicable to the VA Home Loan Guaranty Program, 38 U.S.C. § 3701 *et seq.*, and specifically § 3702(b)(1)(B) of Title 38 of the United States Code?

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No.

In The
Supreme Court of the United States

TAYLOR AYES, WILLIAM P. CUTSHALL, FRANK A. RIBAR, EDWARD C. SMITH, JAMES F. MARTIN, and WILLIAM C. TERRIO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioners, Taylor Ayes, William P. Cutshall, Frank A. Ribar, Edward C. Smith, James F. Martin, and William C. Terrio respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 473 F.3d 104 and is reproduced in the Appendix (App.) at 1. The order of the court of appeals denying rehearing en banc is reproduced at App. 17.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2006. A petition for rehearing en banc was denied on February 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 525(a) provides:

> Except as provided in the Perishable Agricultural Commodities Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943, a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . . solely because such bankrupt or debtor is or has been a debtor under this title . . . or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act.

38 U.S.C. § 3702(b)(1)(B) provides:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this Chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured, or direct loan, if . . . the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full.

STATEMENT OF THE CASE

This case involves the one of the most important sections of the United States Bankruptcy Code, the "fresh start" embodied in the discharge granted by Section 727,[1] and the Respondent's interpretation and application of the statutes and regulations governing its home loan guaranty program. At issue is whether Respondent is subject to the anti-discrimination provisions of 11 U.S.C. § 525 when it makes determinations about whether or not to allow Petitioners to fully participate in the loan guaranty entitlement program codified in 38 U.S.C. §§ 3701–3733, following Petitioners discharge of a debt to Respondent, instead of treating the discharged debt as if it never existed.

Section 524 creates a permanent injunction against the collection of any discharged debt. This

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[1] A debtor filing for relief under Chapter 13 of the bankruptcy code receives a discharge pursuant to 11 U.S.C. § 1328 after all plan payments have been completed.

injunction is a "total prohibition on debt collection efforts," and is intended to "insure that once a debt is discharged, the debtor will not be pressured *in any way* to repay it. In effect, the discharge extinguishes the debt . . . ." H.R. 95-595, at 365 (emphasis added). The fresh start requires that the discharged debt be treated as if it never existed. Otherwise, it would be difficult to imagine a fresh start for a bankrupt individual, if the individual remains saddled with the incidents of prior debts." *Henry v. Heyison*, 4 B.R. 437, 440 (Bankr. E.D. Pa. 1980).

Section 525 of the Bankruptcy Code was enacted following this Court's landmark decision in *Perez v. Campbell*, 402 U.S. 637 (1971). In *Perez*, this Court held that an Arizona statute that allowed the state to withhold the issuance of a debtor's driver's license following the discharge of a tort judgment in bankruptcy frustrated the full effectiveness of the "fresh start." Following *Perez*, Congress enacted Section 525 to prohibit discrimination against debtors by preventing governmental units from denying the receipt of certain governmental benefits solely because that debtor failed to repay a debt that was discharged in bankruptcy. 11 U.S.C. § 525(a).

Despite the protection afforded to debtors by Section 525, Respondent has discriminated against Petitioners by conditioning their full participation in the home loan guaranty program upon the repayment of a discharged debt. Congress enacted the home loan guaranty program, codified in 38 U.S.C. § 3701 *et seq.*, following World War II, as part of the Serviceman's Readjustment Act of 1944. This Act was an effort to place Veterans on an even playing field with non-Veterans. One of the key provisions of this act provides a guaranty for eligible Veterans purchasing a residence whereby the Respondent guaranties a portion of a Veteran's loan with

a third party lender.[2] Should a Veteran default on his home mortgage, the Respondent has a claim against the Veteran for the amount paid by the Respondent to the lender on the guaranty. The amount paid by the Respondent to the lender is commonly referred to as a "loss" in the relevant guaranty statutes. A Veteran may have a previously used home loan entitlement restored subject to certain conditions. However, following a loss, the only way a Veteran's loan guaranty may be restored is if "the loss has been paid in full." 38 U.S.C. § 3702(b)(1)(B). This requirement that a loss be fully repaid before a guaranty is fully reinstated is discretionary, as "[t]he Secretary *may*, in any case involving circumstances deemed appropriate, waive . . . the requirement" that the loss be paid in full before reinstatement of the full loan guaranty entitlement. 38 C.F.R. § 36.4302(k) (emphasis added).

Petitioners are all Veterans who are qualified under the home loan guaranty program, and had participated in the program in the past. Petitioners each caused Respondent to incur a loss when it paid on the guaranty to the private lending institution. Petitioners then discharged their obligations to Respondent in their respective bankruptcy cases. When Petitioners later sought to have their full guaranty restored, they were denied the full restoration of their entitlement by the Respondent to the extent of the loss to Respondent, despite the discretion given to Respondent to fully restore a Veteran's full home loan guaranty entitlement, and despite the provisions of Section 525.

Petitioners filed this action, alleging that Respondent's denial of their full loan guaranty to the

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[2] The Respondent does not make loans directly to Veterans under this statute; instead, the Respondent agrees to pay a statutorily determined amount to a third party lender should the Veteran default on its home mortgage.

extent of the loss caused to Respondent violated Section 525 of the Bankruptcy Code. Following an Order by the United States District Court for the Eastern District of North Carolina which granted Respondent's motion to dismiss the Petitioners' Complaint,[3] the Petitioners appealed to the United States Court of Appeals for the Fourth Circuit.

On December 27, 2006, the court of appeals issued an opinion affirming the district court's ruling. While the court of appeals found that Respondent's home loan guaranty program constituted a grant, it held that this grant was not similar to the other grants set forth in Section 525(a) because it was not related to the pursuit of employment or economic betterment and was also available from the private sector. *Ayes v. U.S. Dept. of Veterans Affairs*, 473 F.3d 104, 108-09 (4th Cir. 2006). Finally, the court of appeals found that the "fresh start" policy contained within the Bankruptcy Code could not be used to construe Section 525(a)'s statutory language more broadly than the limitation placed on the protected grants by the inclusion of the word "similar" in the statute. *Id.* at 111. Petitioners petition for Rehearing En Banc was denied on February 23, 2007.

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[3] Petitioners filed a cross motion for partial summary judgment, alleging that Respondent had violated Section 525; however, because the district court determined that Section 525 did not apply to Respondent, it denied Petitioners' motion without deciding whether Petitioners would have succeeded on the remaining elements of their claim under Section 525. In its appeal to the Fourth Circuit, Petitioners contended that the district court's decision should have been reversed and Petitioners' motion for summary judgment should have been granted. Like the district court, the court of appeals did not reach the issue of the remaining elements of Petitioners' claim under Section 525, finding that Section 525 did not apply to Respondent in this instance.

REASONS FOR GRANTING CERTIORARI

The Fourth Circuit held in this case that the home loan guaranty entitlement was not similar to those governmental benefits or programs specifically set forth in Section 525(a). This holding is erroneous and improperly limits the reach of Section 525(a) and the fresh start policy underlying the entire purpose of the Bankruptcy Code. Respondent's discriminatory treatment of Veterans like Petitioners undermines the fresh start, both by rendering the discharge ineffective, as Veterans are required to repay discharged debts to participate in the program, and by impacting the ability to obtain affordable housing which is critical to a debtor's ability to emerge from bankruptcy and receive the benefits of the fresh start.

Moreover, the ruling conflicts with this Court's holding in *Federal Communications Commissions v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) which requires a broad interpretation of Section 525. The court of appeals decision also conflicts with the decision of the Second Circuit in *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), which found that a public housing lease was a protected grant that could not be revoked solely because a debtor failed to repay a discharged debt. The Second Circuit also cast doubt as to the continued viability and applicability of *Goldrich v. New York State Higher Education Services Group*, 771 F.2d 28 (2d Cir. 1985) an earlier opinion from the second circuit upon which the Fourth Circuit relied in denying Petitioners' appeal.

This erroneous interpretation of Section 525(a) impacts a substantial number of debtors and Veterans by significantly limiting the scope of Section 525(a), creating the potential for the very discriminatory conduct

Congress drafted Section 525 to prohibit. Review by this Court is necessary in order to determine the proper scope of Section 525.

I. THE DECISION OF THE FOURTH CIRCUIT IMPROPERLY LIMITS THE FRESH START THROUGH ITS NARROW INTERPRETATION OF SECTION 525.

The court of appeals' decision improperly exempts Respondent from Section 525, and therefore allows Respondent to condition receipt of a grant on the repayment of a discharged debt, notwithstanding the effect of the discharge. The discharge granted to a bankruptcy debtor discharges a debtor from all of his debts that arose before the date of the petition, without regard to whether the creditor filed a proof of claim pursuant to 11 U.S.C. § 501 or whether or not such claim is allowed under 11 U.S.C. § 502. *See* 11 U.S.C. § 727(b). This discharge is "the heart of the fresh start provisions of the bankruptcy law." H. REP. NO. 95-595, at 384 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963 (hereinafter "H.R. 95-595"). The discharge is considered the "cornerstone of the fresh start policy." *Schultz v. Shapiro*, 59 B.R. 844, 847 (Bankr. E.D.N.Y. 1986); *In re Bogdanovich*, 292 F.3d 104, 107 (2d Cir. 2002) ("Congress made it a central purpose of the bankruptcy code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts."); *see generally* Reginald A. Greene, *Supreme Court Invalidates FCC License Revocation*, 2 BUSINESS RESTRUCTURING REVIEW 2 (2003) ("The 'fresh start' principle is based on the notion that a debtor should emerge from bankruptcy with a clean slate.").

This Court has found that the purpose of the fresh start is to:

> 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.

Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). Discharged debts are to be treated as if they never existed: "Once a debt has been discharged under the Code a state may not treat a debtor differently than a person who never incurred a debt." *Henry v. Heyison*, 4 B.R. 437, 442 (E.D. Penn. 1980). Otherwise, it would be "difficult to imagine a fresh start for a bankrupt individual, if the individual remains saddled with the incidents of prior debts." *Id.* at 442.

In 2003, this Court addressed the fresh start in the context of Section 525 for the first time in *Federal Communications Commission v. Nextwave Personal Communications Inc.*, 537 U.S. 293 (2003). In *Nextwave*, this Court gave a broad interpretation to Section 525, finding, among other things, that the government's

motive was irrelevant when determining whether a governmental unit discriminated against a debtor solely because of a discharged debt. *Id.* at 302-303. Although *Nextwave* dealt with discrimination in the context of licenses, this Court's analysis of section 525 shows that a broad reading of the statute is required in order not to render the section superfluous. *See id.* at 302.[4] In both the holding and the underlying reasoning, this Court upheld the sanctity of § 525(a) and thereby the fresh start:

> The whole issue before us can be described as asking what the Bankruptcy Code's promise of a "fresh start" consists of. Rather than reframing the question, our interpretation concretely accords a "fresh start" where the dissent would not -- where there is revocation of a license solely because of a bankrupt's failure to pay dischargeable debts.
>
> . . . .
>
> We think Congress meant what it said: The Government is not to revoke a bankruptcy debtor's license solely because of a failure to pay his debts.

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[4] 11 U.S.C. § 525(a) specifically excepts the Perishable Agricultural Commodities, Act, 1930, the Packers and Stockyards Act, 1921, and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1994, and for other purposes, approved July 12, 1943." The Court in *NextWave* noted that these specific exceptions set forth in Section 525 would be "entirely superfluous" if the Court accepted the FCC's motive exception, "which means, of course, that such a reading must be rejected." *Nextwave*, 537 U.S. at 302.

Id. at 305-06 & n. 4. *Nextwave* supports granting a broad interpretation of Section 525 in order to protect the fresh start, and shows that the Fourth Circuit's decision to interpret Section 525 narrowly is incorrect and must be reversed.

Not only has this Court indicated a broader reading of Section 525 is appropriate, Congress intended that courts broadly interpret Section 525 to protect against discrimination:

> [This] section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination....The Courts will continue to mark the contours of the anti-discrimination provisions of the Bankruptcy Code in pursuit of sound bankruptcy policy.

H.R. Rep. 95-595, at 366-367 (1997) *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 (hereinafter H.R. Rep. 95-595); *In re Jasper*, 325 B.R. 50, 54 ("It is universally recognized that the statutory enumeration of various proscribed forms of discrimination is not exhaustive."). This Court should grant Petitioners' request for certiorari in order to ensure that Section 525 is interpreted in the manner intended by Congress.

II. THE DECISION OF THE FOURTH CIRCUIT CONFLICTS WITH A PRIOR DECISION OF THE SECOND CIRCUIT.

The court of appeals decision that Respondent's loan guaranty program was not similar to the programs and benefits included in Section 525 is in error and

conflicts with the decision of the Second Circuit in *In re Stoltz*, 315 F.3d 80 (2nd Cir. 2002). *Stoltz*, one of the few cases to examine what constitutes a protected grant, focused on the unavailability of the grant from the private sector and whether or not the grant was critical to the fresh start. *Stoltz*, 315 F.2d at 90. The Fourth Circuit, however, found that a protected grant bore no relation to the fresh start, allowed the individual to "pursue some occupation or endeavor aimed at economic betterment." In its analysis, the Fourth Circuit relied heavily on *In re Goldrich*, 771 F.2d 28, 30 (2d Cir.1985), which is of doubtful validity following the *Stoltz* decision. Because of its reliance on this case, the Fourth Circuit incorrectly limited the scope of Section 525 to economic or employment matters, instead of those matters critical to the fresh start, as found in *Stoltz*. Review by this Court is necessary in order to ensure that grants critical to the fresh start are protected by Section 525.

In *Stoltz*, the Second Circuit concluded that all of the enumerated items in section 525, as well as those items found to be similar to the enumerated programs or benefits, share the common characteristic of being property interests that are (1) unattainable from the private sector, and (2) essential to a debtor's fresh start. *Id.*, at 90. Here, the entitlement provided by the Respondent shares these common characteristics. Just as a debtor-tenant's current public housing lease is her "single most significant material possession," *see Stoltz; In Re Whitsett*, 163 B.R. 752, 755 (Bankr. E.D.Pa. 1994), a Veteran's access to housing is likewise essential. There is no greater essential to the "fresh start" than accessible housing. Minimizing the Petitioners' guaranty effectively limits their access to affordable housing. While it is true that the Petitioners might be able to obtain a *loan* from another lender on less favorable terms, the "similar grant" at issue here is not the loan, but the *guaranty* of a loan by Respondent. The loan guaranty entitlement is

something that is only available from the government, as this type of benefit is not provided by the private sector because it is a financial incentive given to qualified Veterans who have met the service requirements. Moreover, as previously noted, just as a debtor-tenant's public housing lease is her "single most significant material possession," *see id.*, so the veteran's access to housing is likewise essential to realizing his or her "fresh start."

The conclusion that the loan guaranty entitlement fits squarely within Section 525(a)'s "other similar grant" language is buttressed by Section 525(a)'s specific exceptions. *See NextWave*, 537 U.S. at 302 ("[W]here Congress has intended to provide regulatory exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly . . . ."). Congress specifically exempted three agricultural related programs from Section 525. *See* 11 U.S.C. § 525(a). In addition, Congress has created an exception for certain federal financial aid programs.

For example, in *In re Betty Owen Schools Inc.*, 195 B.R. 23 (Bankr. S.D.N.Y. 1996), the court found that the Department of Education did not violate Section 525 when it decertified a debtor/school from participating in federal aid programs. The court found that while the Department of Education appeared to violate Section 525 on its face, Congress had limited the fresh start for schools which filed bankruptcy by modifying section 362(b) to exclude determinations of eligibility to participate in the federal program from the automatic stay and by defining property of the estate to exclude eligibility to participate in federal financial aid programs.

Had Congress wanted to exempt the VA Home Loan Guaranty Program it could have created an exception for it in Section 525, or somehow limited the fresh start for veterans by modifying other sections of the

Code. Absent an express exception or limitation on the fresh start, Section 525 should apply to prevent the Respondent's discriminatory conduct in light of Congress' directive that Section 525 be construed broadly. *See* H.R. 95-595, at 336.

The Fourth Circuit's holding that the loan guaranty program does not qualify as a similar grant because it is not a program of economic betterment is erroneous and ignores the very purpose of Respondent's program. The specific purpose of the loan guaranty program was to compensate for the effect of serving in the armed forces on a Veterans' ability to obtain credit by guaranteeing private loans made by third parties, which was determined to be beneficial to a Veteran's economic wellbeing:

> Since the inception of the program, the congressional objective has been to assist eligible veterans to become homeowners. Veterans are assisted by making it possible for them to compete in the market place for credit with persons who were not obliged to forego the pursuit of gainful occupations by reason of service in the Armed Forces of the nation. The VA programs are intended to benefit men and women because of their service to the country . . .
>
> . . . .
>
> Credit was viewed as one of the cornerstones of a program to aid the veteran in his/her effort to readjust to civilian life. In the opinion of the supporters of the original legislation, the

> Government should provide the means whereby the veteran could obtain favorable credit which would permit him/her to shelter his/her family or begin a business[5] or farming venture. This concept arose because of the feeling that veterans, in view of their service in the Armed Forces had missed an opportunity to establish a credit rating which could be the basis of borrowing to acquire a home or to establish a business. The establishment of the loan guaranty program was an attempt to place the veteran on a par with his/her nonveteran counterpart.

Legislative History of the VA Home Loan Guaranty Program (updated 1/1/00), *at* http://www.homeloans.va.gov/docs/HISTORY.doc. The legislative history clearly shows that while other individuals may be able to obtain credit, and thereby obtain housing on favorable terms, a Veteran's time spent serving his county may adversely affect his ability to purchase a home because of his diminished credit standing, an impact significant to this particular group of debtors, making the guaranty critical to the fresh start. Congress meant the home loan guaranty to act as an economic betterment program by providing Petitioners and other Veterans with the means to improve their financial position by becoming homeowners, using the guaranty to compensate for their lack of credit history.

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[5] The current legislation does not provide for business related lending to veterans.

The decision of the Fourth Circuit also conflicts with the Second Circuit's prior ruling in *Stoltz* by its reliance on *In Re Goldrich*, 771 F.2d 28 (2d Cir. 1985), upon which the Second Circuit case doubt as to its continuing validity in *Stoltz*. Congress specifically overruled *Goldrich* when Congress amended section 525 in 1994 to include subsection (c). Congress specifically stated that "this section overrules *In re Goldrich*, 771 F.2d 28 (2nd Cir. 1985), which gave an ***unduly narrow*** interpretation to Code section 525." H.R. Rep. No. 103-835, at 58 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 3340, 3367 (emphasis added). Congress also made it clear that section 525(c) was not limited to student loan cases: "Like section 525 itself, this section is not meant to limit ***in any way*** other situations in which discrimination should be prohibited." *Id.* at 3367 (emphasis added); *see also Collier on Bankruptcy* § 525.02[5] (15th ed. rev. 2005) ("Thus, not only decisions permitting discrimination with respect to student loans, but also decisions permitting discrimination in other loan-related benefit programs, must be questioned anew in light of this clear statement of congressional intent.").

The Second Circuit itself expressly recognized that Congress disapproved of its conclusion in *Goldrich* that credit transactions, in general, were not subject to section 525. *See In re Stoltz*, 315 F.3d 80, 86 & n. 2. (2nd Cir. 2002) ("Section 525(c) signaled congressional disapproval of *Goldrich* in which this Court had narrowly construed section 525(a)'s 'other similar grant' language to not include extensions of credit.") (citations omitted). In addition, not all cases examining section 525(a) have agreed with *Goldrich*. *See, e.g., Rose v. Connecticut Hous. Fin. Auth.*, 23 B.R. 662, 667 (Bankr. D.Conn. 1982) ("Congress intended to prevent discriminatory treatment in the field of mortgage financing.").

Furthermore, since the validity of excluding an extension of credit from section 525 remains in question, cases such as *Watts* and *Toth v. Michigan State Housing Development Authority*, 136 F.3d 477 (6th Cir. 1998), have also been called into doubt. These cases never adequately examined the state programs at issue to determine if they were "more in the nature of benefits conferred upon needy applicants, without regard to their credit worthiness, and therefore more similar to a franchise or similar grant, than an extension of credit." *Collier*, § 525.02[5]. Based on this, it is clear that the District Court's reliance on *Goldrich* and its progeny is misplaced, and section 525(a) must be read to prohibit discrimination in loan guaranty programs. This Court should review the decision of the Fourth Circuit in order to resolve the conflict between the Fourth Circuit and the Second Circuit as to whether or not the fresh start plays any role in determining whether a grant is subject to Section 525.

III. THIS CASE PRESENTS A QUESTION OF SIGNIFICANT NATIONAL IMPORTANCE.

Finally, this Court should review the decision of the Fourth Circuit because of its significant impact on both Veterans like Petitioners as well as debtors who have received discharges under the Bankruptcy Code. The most significant effect of the court of appeals' decision is to significantly narrow the "fresh start" by permitting Respondent to circumvent the discharge injunction by requiring that Petitioners either forgo the full effect of the discharge, or repay a debt discharged during their bankruptcy cases. Allowing this practice to continue renders the discharge useless to a significant number of Veterans. In addition, the narrow interpretation of Section 525 opens the door to other governmental units to engage in similar discriminatory conduct and coerce debtors into repaying discharged

debts or being prohibited from receiving grants that other non-debtors receive.

Because the court of appeals' decision addresses the significant question of the scope of the fresh start, and ultimately whether Respondent will be able to continue to force a significant number of Veterans to choose between giving up their fresh start or choosing to participate in the loan guaranty entitlement program, this decision should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Trawick H. Stubbs, Jr., *Counsel of Record*
Laurie B. Biggs
Stubbs & Perdue, P.A.
8450 Falls of Neuse Road, Suite 206
Raleigh, NC 27615
Telephone: (919) 870-6258
Facsimile: (919) 870-6259

Kenneth E. Banks
N.C. State Bar No.: 5497
Law Offices of Kenneth E. Banks
Post Office Box 25206
Fayetteville, NC 28314
Telephone: (910) 864-3611
Facsimile: (910) 864-5146

May 24, 2007.

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PUBLISHED

[ENTERED: DECEMBER 27, 2006]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2263

TAYLOR AYES; WILLIAM P. CUTSHALL; FRANK A. RIBAR; EDWARD C. SMITH; JAMES F. MARTIN; WILLIAM C. TERRIO,
Plaintiffs-Appellants,

v.

U. S. DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh.
W. Earl Britt, Senior District Judge.
(CA-04-904-5)

Argued: October 26, 2006

Decided: December 27, 2006

Before WILKINSON, NIEMEYER, and WILLIAMS,
Circuit Judges.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Judge Wilkinson and Judge Niemeyer joined.

COUNSEL

ARGUED: Trawick Hamilton Stubbs, Jr., STUBBS & PERDUE, P.A., Raleigh, North Carolina, for Appellants. Neal Irving Fowler, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Laurie B. Biggs, STUBBS & PERDUE, P.A., Raleigh, North Carolina, for Appellants. Frank D. Whitney, United States Attorney, Anne M. Hayes, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

Taylor Ayes, William P. Cutshall, Frank A. Ribar, Edward C. Smith, James F. Martin, and William C. Terrio (collectively "Appellants") filed a class action complaint against the U.S. Department of Veterans Affairs (VA) on behalf of themselves and a putative class of veterans. The complaint alleged that the VA violated 11 U.S.C.A. § 525 (West 2004 & Supp. 2006), the anti-discrimination provision of the Bankruptcy Code, by refusing to fully restore veteran home-loan guaranty entitlements to Appellants solely because of their previous discharges in bankruptcy. The district court granted the VA's motion to dismiss, made pursuant to

Federal Rule of Civil Procedure 12(b)(6), because it concluded that § 525(a) does not apply to the veteran guaranty entitlement, which is set out at 38 U.S.C.A. § 3701 *et seq.* (West 2002 & Supp. 2006).

We affirm. Section 525(a) prohibits a governmental unit from denying a "license, permit, charter, franchise, or other similar grant" solely because an individual has filed for or received a discharge in bankruptcy. 11 U.S.C.A. § 525(a). Because Appellants concede that the veteran guaranty entitlement is not a "license," "permit," "charter," or "franchise" and we hold that it is not an "other similar grant," we conclude that § 525(a) does not apply to the veteran guaranty entitlement.

I.

Because the facts of this appeal are undisputed, we are left only to decide the legal question of § 525(a)'s applicability to the veteran guaranty entitlement. Pursuant to the Servicemen's Readjustment Act of 1944, codified at 38 U.S.C.A. § 3701 *et seq.*, the VA provides housing assistance to certain veterans meeting length-of-service requirements by guarantying home loans made to them by private lenders. The VA "automatically guarantee[s]" loans for certain veterans when the loans will be used for, among other things, the purchase or construction of a home. 38 U.S.C.A. § 3710(a). Pursuant to 38 U.S.C.A. § 3703, the VA computes the guaranty amount as a percentage of the unpaid loan balance, with the percentage varying depending on the size of

the original loan.[1] 38 U.S.C.A. § 3703(a)(1)(A). If the veteran later defaults on the loan, the VA pays the private lender the amount it guaranteed on behalf of the veteran. 38 U.S.C.A. § 3732(a)(1). In such cases, the VA becomes subrogated to the rights of the private lender for the amount paid by the VA on the guaranty. *Id.* While the regulations relating to the veteran guaranty program state that any amount paid by the VA in satisfaction of a guaranty made on behalf of a veteran "shall constitute a debt owing to the United States by such veteran," 38 C.F.R. § 36.4323(e) (2006), the VA acknowledges that it does not take any action to collect this debt.

There is no limit to the number of times a veteran may receive the guaranty entitlement, but the amount of guaranty available to the veteran is always limited by any previously used guaranty amount that has not been restored to the VA or does not otherwise qualify for exclusion. 38 U.S.C.A. § 3702(b). Specifically, § 3702(b) provides the following:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guaranteed, insured,

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[1] For example, the basic entitlement for any loan of more than $56,520 is the lesser of $36,000 or forty percent of the loan. 38 U.S.C.A. § 3703(a)(1)(A)(i)(III)(West 2002 & Supp. 2006).

> or direct loan under the following circumstances:
>
> > (1) (A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and
> >
> > (B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full.

38 U.S.C.A. § 3702(b)(1)(A)-(B).

In other words, the amount of guaranty available to a veteran upon a successive application for the benefit is reduced by the amount of loss that the VA suffered on any previous guaranty made on behalf of the veteran until that loss is repaid.[2] Absent an exercise of the VA's discretion to waive the repayment requirements, if a veteran wishes to receive the "full" guaranty amount after the VA

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[2] The VA does retain some discretion in computing the aggregate amount of guaranty available to a veteran who has previously used the guaranty entitlement. Section 3702(b) states that the VA Secretary "may exclude" previously used amounts of guaranty when the requirements in either § 3702(b)(1)(A) or (b)(1)(B) are met. 38 U.S.C.A. § 3702(b). The regulations implementing the statute provide that the VA Secretary, "in any case involving circumstances deemed appropriate, may waive" the requirements in § 3702(b)(1)(A) or (b)(1)(B). 38 C.F.R. § 36.4302 (2006). Obviously, the VA chose not to exercise its discretion to waive these requirements in Appellants' cases.

previously suffered a loss on a guaranty made on his or her behalf, the veteran has no choice but to repay the loss in full.

Appellants are six veterans who allege that they sought home loans from various private lenders after having received discharges in bankruptcy under either Chapter 7 or Chapter 11 of the Bankruptcy Code and were denied these loans because the VA refused to extend "full" guaranties on their behalf. The VA refused to extend full guaranty amounts to Appellants because it had suffered losses on previous loan guaranties made on their behalf that had not been repaid. Appellants contend that as a result of the VA's decision not to fully reinstate loan guaranties to them following their discharges in bankruptcy, they were severely limited in their ability to obtain private home loans. We have jurisdiction over this appeal pursuant to 28 U.S.C.A. § 1291 (West 2006).

II.

We review de novo the district court's grant of the VA's motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(6). *Bominflot, Inc. v. The M/V Henrich S*, 465 F.3d 144, 145 (4th Cir. 2006). "[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

Section 525(a) of the Bankruptcy Code provides in pertinent part that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to . . . [or] discriminate with respect to such a grant against . . . a person that is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act . . . ." 11 U.S.C.A. § 525(a). The statute codified the result of *Perez v. Campbell*, 402 U.S. 637 (1971), in which the Supreme Court applied the Supremacy Clause to strike down an Arizona financial responsibility law that conditioned reinstatement of a debtor's driver's license on repayment of an accidentrelated judgment that had been discharged in bankruptcy. *Id.* at 656. The Court held that the Arizona law violated the policy underlying the Bankruptcy Code, sometimes called the "fresh start" policy, that debtors be given a "new opportunity in life . . . unhampered by the pressure and discouragement of pre-existing debt" because it gave creditors a "powerful weapon with which to force bankrupts to pay their debts despite their discharge." *Id.* at 648, 654 (internal quotation marks omitted).

To establish a violation of § 525(a), Appellants must show that (1) the VA is a governmental unit, (2) the veteran guaranty entitlement is an item covered by the statute, and (3) the VA discriminated against Appellants solely because of their discharges in bankruptcy. 11 U.S.C.A. § 525(a). The VA concedes that it is a "governmental unit" under the statute, but argues that Appellants cannot show that the veteran guaranty entitlement is an item covered by § 525(a) or that the VA discriminated against

Appellants solely because of their prior discharges in bankruptcy.

Conceding that the veteran guaranty entitlement is not a "license," "permit," "charter," or "franchise," Appellants argue that the veteran guaranty entitlement comes within § 525's protections because it is an "other similar grant." The veteran guaranty entitlement is undoubtedly a "grant" as that term is used in the statute: a veteran satisfying the length-of-service requirements is entitled to the loan guaranty benefit. *See Black's Law Dictionary* 719 (8th ed. 2004) (defining grant as "an agreement that creates a right of any description other than the one held by the grantor"). The question is whether it is a "similar" grant to those specific items listed in § 525(a).

In interpreting a statute, "a court should always turn first to one, cardinal canon [of construction] before all others": the plain meaning rule. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). We must presume that "Congress says in a statute what it means and means in a statute what it says. . . ." *Hartford Underwriters Ins. Co. v. Union Planters Blank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotation marks omitted). When the words of a statute are unambiguous, then, "this first canon is also the last: 'judicial inquiry is complete.'" *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Of course, in looking to the plain meaning, we must consider the context in which the statutory words are used because "[w]e do not . . . construe statutory phrases

in isolation; we read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

Section 525(a)'s meaning is plain. The statute clearly specifies that its protections extend to "licenses, permits, charters, [and] franchises," and to grants "similar" to those items.[3] 11 U.S.C.A. § 525(a). Although the term "grant" is not defined in the statute, the use of the word "similar" limits the universe of "grants" to which § 525(a) applies, ensuring that only grants bearing a family resemblance to licenses, permits, charters, and franchises enjoy the antidiscrimination protections of the Bankruptcy Code. Unfortunately for Appellants, the veteran guaranty entitlement bears no such resemblance to the items listed in § 525(a). Licenses, permits, charters, and franchises are all governmental authorizations that typically permit an individual to pursue some occupation or endeavor aimed at economic betterment. *See Watts v. Pa. Hous. Fin. Co.*, 876 F.2d 1090, 1093 (3d Cir.

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[3] We note that our mode of analysis would not change even if the word "similar" were omitted from the statute. When "general words follow specific words in a statutory enumeration," we apply the interpretive principle of *ejusdem generis* ("of the same kind") and construe "the general words . . . to embrace only objects *similar* in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't of Soc. and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003)(emphasis added)(internal quotation marks omitted). Omitting the word "similar," Section 525(a) would present a "textbook *ejusdem generis* scenario." *Andrews v. United States*, 441 F.3d 220, 224 (4th Cir. 2006). It would contain a general phrase — "other grant" — that followed a list of specific items — "license, permit, charter, franchise." 11 U.S.C.A. § 525(a).

1989)("[T]he items enumerated [in § 525(a)] are in the nature of indicia of authority from a governmental unit to the authorized person to pursue some endeavor."). For example, governmental entities issue real-estate, driver's, and medical licenses; building and business permits; corporate charters; and utility franchises. All of these implicate "government's role as a gatekeeper in determining who may pursue certain livelihoods," *Toth v. Mich. State Hous. Dev. Auth.*, 136 F.3d 477, 480 (6th Cir. 1998), and show that Congress intended § 525(a)'s protections to be "limited to situations sufficiently similar to *Perez*," *In re Goldrich*, 771 F.2d 28, 30 (2d Cir. 1985). This interpretation of "other similar grant" is supported by the remainder of § 525(a), which forbids governmental discrimination in *employment* decisions based on an individual's discharge in bankruptcy. *See* 11 U.S.C.A. § 525(a).

A home loan guaranty, on the other hand, does not implicate the government's gate-keeping role in determining who may pursue certain livelihoods because, unlike the enumerated items in § 525(a), a person can obtain a home loan or guaranty from the private sector. A governmental entity's refusal to issue, for example, a commercial real estate license to a bankrupt individual completely forecloses that individual from legally pursuing a career as a commercial realtor. If a governmental entity refuses to guarantee a home loan for a bankrupt individual, however, that individual is not doomed to homelessness; he may seek a guaranty from family or friends, may seek another private loan, perhaps on less favorable

terms, or he may rent.[4] Indeed, Appellants concede that they "might be able to obtain a home loan from another lender on less favorable terms." (Appellant's Br. at 18.) That governmental units do not exercise exclusive or even pervasive control over the "world" of home loans dooms Appellants' argument.

The Second Circuit's decision in *Goldrich*, which has served as the lodestar in the § 525(a) context, is the closest analogue to the instant case.

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[4] Appellants rely on the Second Circuit's decision in *In re Stoltz*, 315 F.3d 80 (2d Cir. 2002), in support of their contention that the veteran guaranty entitlement is similar to the enumerated items in § 525(a). In *Stoltz*, the Second Circuit held that a public housing lease is an "other similar grant" under § 525(a). *Id.* at 90-91. Reasoning that the enumerated items in § 525(a) are "property interests [that] are unobtainable from the private sector and essential to a debtor's fresh start," the *Stoltz* court noted that a public housing lease is "by definition . . . obtainable only from governmental entities" and that "[i]n light of the notoriously lengthy waiting lists that may exist for public housing, . . . an evicted debtor-tenant . . . would quite possibly become homeless - a status not conducive to economic survival." *Id.* at 90. Even if we agreed with *Stoltz*, the public housing lease at issue in that case is manifestly different than the home loan guaranty here. First, unlike a public housing lease, home loans and loan guaranties are not "by definition" only obtainable from governmental entities. Second, as we have noted, failure to obtain a home loan guaranty is not a step toward homelessness for the veterandebtor; the veteran may obtain a home loan on less favorable terms or may choose alternative housing arrangements that do not involve ownership. Third, unlike the public housing benefit in *Stoltz*, the veteran guaranty entitlement is not available only to those who, through bankruptcy or other financial hardship, cannot obtain a home loan. If Oliver Stone, the presumably wealthy Oscar-winning film director and veteran of the Vietnam War, applied for the guaranty benefit, he would be entitled to receive it just like the recently-bankrupted veteran would.

Goldrich held that § 525(a) was inapplicable to New York's student loan guaranty program because a student loan guaranty was not a "similar grant" to the items listed in the statute. *Goldrich*, 771 F.2d at 30-31. The *Goldrich* court reasoned that a "credit guarantee is not a license, permit, charter, or franchise[,] nor is it in any way similar to those grants," and stated that "[a]lthough the exact scope of the items enumerated [in § 525(a)] may be undefined, the fact that the list is composed solely of benefits conferred by the state that are unrelated to credit[5] is unambiguous." *Id.* at 30 (footnote added). "[R]eluctant to probe beyond the plain language of [§ 525(a)]," the court concluded that the student loan guaranty at issue was of a "distinctly different character" than the items listed in the statute. *Id.*

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[5] While we emphasize that the central question under § 525(a) is whether the home loan guaranty is an "other similar grant" to the items listed in the statute and not whether the guaranty is more like an extension of credit, we agree with the district court that "the extension of a home loan guaranty has financial consequences for the guarantor that are not dissimilar to consequences often faced by those who extend credit." (J.A. at 132.) Moreover, and contrary to Appellants' contention, a veteran's creditworthiness is relevant, at least minimally, to the overall decision to extend the guaranty benefit; a veteran is only automatically eligible for a guaranty when a private lender concludes that the veteran meets the standards of creditworthiness — including debt-to-income ratio, income-stability, and monthly-income requirements — established *by the VA*. *See* 38 U.S.C.A. §§ 3701(g)(2), (3) (West 2002). These facts reveal the similarities between the veteran guaranty entitlement and traditional extensions of credit and clearly show the *dissimilarities* between the guaranty entitlement and the items listed in § 525(a).

Appellants acknowledge that *Goldrich*'s rationale is plainly at odds with their position on appeal, but they argue that Congress's enactment in 1994 of 11 U.S.C.A. § 525(c) rendered *Goldrich* a dead letter and clearly evinced Congress's intent to have § 525(a) apply to all government loan guaranties. To be sure, § 525(c) clearly abrogated *Goldrich*'s specific holding and extended the anti-discrimination protections of § 525(c) to student loan guaranties. *See* 11 U.S.C.A. § 525(c)("A governmental unit that operates a *student grant or loan program* . . . may not deny a grant, loan, *loan guarantee*, or loan insurance to a person that is or has been a debtor under this title or . . . under the Bankruptcy Act. . . ." (emphasis added)). There is, however, no indication in the language of § 525(c) that Congress also intended the section to apply to other kinds of loan guaranties besides those of the student loan variety. Congress's tightly-worded abrogation of *Goldrich*'s specific holding "justif[ies] the inference that items not mentioned" — in this case, other kinds of loan guaranties — "were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). Had Congress intended to extend § 525's protections to other government loan guaranties besides student loans, it easily could have revised § 525(a) to prevent a governmental unity from denying a "license, permit, franchise, charter, *loan guaranty*, or other similar grant" on the basis of a previous discharge in bankruptcy or, alternatively, it could have included some term in § 525(c) that would have supported extension of § 525(a)'s protections to all government loan guaranties, not just those of the student loan variety. That Congress chose instead to

narrowly amend § 525 to abrogate the specific holding of *Goldrich* is strong evidence that its failure to mention other kinds of loan guaranties in § 525(c) was intentional.[6] The time-honored maxim *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another") applies with great force here.

In reaching this conclusion, we, like our sister circuits, refuse to venture beyond the confines of the statutory language to broadly construe § 525(a)'s specific "other similar grant" language in reliance on the general "fresh start" policy underlying the Bankruptcy Code. *See, e.g.*, *Watts*, 876 F.2d at 1093-94 (holding that an emergency mortgage-assistance loan is not an "other similar grant" and stating that "[w]hen an unambiguous statute is interpreted to mean what it says, the interpretation is not narrow"); *Toth*, 136 F.3d at 479-80 (holding that a government home improvement loan is not an "other similar grant" under § 525(a)); *Goldrich*, 771 F.2d at

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[6] Appellants argue that exclusion of the veteran loan guaranty program from the protections of § 525(a) makes little sense in light of Congress's extension of § 525(a)'s coverage to student loan guaranties, but Congress could easily have concluded that the differences between student and home loan guaranties require such a distinction. Because education is often crucial to securing employment, § 525(c)'s prohibition against discrimination in the granting of student loan guaranties to bankrupts is consistent with § 525's goal of allowing former debtors in bankruptcy to earn a living. *See* 11 U.S.C.A. § 525(c). Moreover, Congress has taken other steps to ensure the continuing wide availability of student loans, highlighting their uniqueness under the Bankruptcy Code. *See, e.g.*, 11 U.S.C.A. 523(a)(8) (West 2004 & Supp. 2006)(making student loans nondischargeable under the Bankruptcy Code except in cases of "undue hardship").

30 (concluding that Congress intended § 525(a)'s reach to be "limited to situations sufficiently similar to *Perez*".). Assuming, as we must, that "Congress says in a statute what it means and means in a statute what it says there," *Hartford Underwriters*, 530 U.S. at 6 (internal quotation marks omitted), we conclude that Congress's limitation of § 525(a)'s protections to licenses, permits, charters, franchises, and grants similar to those items indicates, at best, the full extent to which Congress intended § 525(a) to effectuate the "fresh start" policy underlying the Bankruptcy Code.[7] As *Watts* noted, because § 525(a) is unambiguous, our interpretation is not "narrow," but instead succinctly correct. *Watts*, 876 F.2d at 1093-94.

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[7] Indeed, on its face, § 525(a) applies to items — such as the recreational hunting and fishing licenses noted above — that can in no way be described as "essential" to a debtor's fresh start, which counsels against courts extending § 525(a) beyond its plain language to effectuate the overarching policy of the Bankruptcy Code. *See Stoltz*, 315 F.3d at 95 (Walker, C.J., dissenting)("Although some interests such as a vendor license, may be essential to a bankrupt's fresh start, others, such as a recreational fishing license, are not."). On the other hand, the inclusion of these items within the definitions of the enumerated items in § 525(a) also does not force a reading of the statute that brings other items unrelated to the goals of § 525(a) within the statute's protections. That the plain language of § 525(a) extends § 525(a)'s protections to items unrelated to § 525(a)'s policies is not an invitation to courts to extend § 525(a)'s protections to items *not covered* by the plain language. In any event, even recreational hunting and fishing licenses are only available from governmental entities.

III.

In sum, because we conclude that the veteran guaranty entitlement is not an "other similar grant" within the meaning of § 525(a), we hold that the anti-discrimination protections of § 525 do not apply to the veteran home loan guaranty program. While we have sympathy for Appellants, if their arguments carried the day and the VA was always required to issue a "full" guaranty irrespective of whether it has suffered a loss on a veteran's behalf, the VA's financial exposure under the program would increase dramatically, potentially threatening the program's long-term viability. This is no mere pipedream, as the incentive for veterans to repay home loans guaranteed by the VA would disappear if veterans could demand full guaranties even after the VA had suffered an unrecouped loss on a guaranty made on their behalf. Requests for full guaranties would likely multiply like party guests, with the VA ultimately "flipping the bill" on defaulted loans at a greater clip. Appellants assume that the VA has deep pockets; we assume that those pockets only function well when they do not have holes in them. Jettisoning the plain language of § 525(a) to extend its coverage over the VA's guaranty program would create such holes. Nevertheless, if Congress wishes to extend § 525's protections to other kinds of loan guaranties besides student loan guaranties, it can easily do so with a few strokes of the pen.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: FEBRUARY 23, 2007]

FILED
February 23, 2007

No. 05-2263
CA-04-904-5

TAYLOR AYES; WILLIAM P. CUTSHALL; FRANK A. RIBAR; EDWARD C. SMITH; JAMES F. MARTIN; WILLIAM C. TERRIO

Plaintiffs - Appellants

v.

U. S. DEPARTMENT OF VETERANS AFFAIRS

Defendant - Appellee

On Petition for Rehearing En Banc

The appellants' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Niemeyer, and Judge Williams.

For the Court,

/s/ Patricia S. Connor
CLERK